No. 95-74

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

DON W. STEPHENS, COMMISSIONER, DEPARTMENT OF INSURANCE, COMMONWEALTH OF KENTUCKY, ET AL., PETITIONERS

v.

THE OWENSBORO NATIONAL BANK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 12 U.S.C. 92 (Supp. V 1993), which provides that national banks in places with no more than 5,000 inhabitants may act as insurance agents, preempts state law to the extent that state law prohibits banks from acting as insurance agents or brokers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 44 F.3d 388. The opinion of the district court (Pet. App. 26a-49a) is reported at 803 F. Supp. 24.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1994. A petition for rehearing was denied on March 15, 1995. Pet. App. 50a-51a. On June 1,

1995, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including July 13, 1995, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The primary respondents in this case are three federally chartered national banks, each owned by a bank holding company and each doing business in a Kentucky town with fewer than 5,000 inhabitants. Pet. App. 27a. In 1990, each bank requested from petitioner the Kentucky Commissioner of Insurance an application for a license to operate a general insurance agency. *Ibid.* Petitioner declined to provide the applications, and instead scheduled a hearing to determine whether issuance of licenses directly to banks would be consistent with Ky. Rev. Stat. Ann. § 287.030(4) (Michie 1988) (*reprinted at* Pet. App. 56a), which provides that "[n]o person who * * * owns or acquires more than one-half (1/2) of the capital stock of a bank shall act as [an] insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, [or] insurance of the interest of a real property mortgagee [*sic*] in mortgaged property, other than title insurance." The Commissioner had previously taken the position that Section 287.030(4) limits the activities of national and state banks with majority owners, as well as those of such owners themselves. See Pet. App. 5a, 27a-28a, 30a, 35a-36a, 41a n.7. The Commissioner's hearing was inconclusive, and the administrative proceedings were eventually stayed by a state court pending the outcome of this litigation.

2. Respondents filed the present suit in federal court seeking declaratory and injunctive relief, on the ground that federal law preempts application of Section 287.030(4) to deny them the insurance agency licenses that they seek. Petitioners relied on Section 13, para. 9, of the Federal Reserve Act, 12 U.S.C. 92 (Supp. V 1993) (*reprinted at* Pet. App. 52a), which provides that any national bank located and doing business in a place with no more than 5,000 inhabitants may, under supervision by the Comptroller of the Currency, "act as the agent for any fire, life, or other insurance company" that is authorized to do business in that State. The United States intervened to oppose petitioners' suggestion (see *id.* at 40a) that 12 U.S.C. 92 had been inadvertently repealed—a contention later rejected by this Court in *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of America, Inc.*, 113 S. Ct. 2173, 2187 (1993)—and to support respondents' arguments concerning the construction and preemptive force of federal law.

The district court granted summary judgment for respondents. Pet. App. 26a-49a. The court first rejected (*id.* at 29a-32a) petitioners' arguments that the case was not ripe, that respondents should be required to exhaust state administrative remedies, and that the court should abstain from deciding the case pending further state proceedings.[1] Petitioners aban-

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[1] With respect to ripeness, the court noted that the Commissioner has "long taken the position that the [respondent] banks are not authorized to act as insurance agents in Kentucky." Pet. App. 29a-30a. The court concluded that the Commissioner's position, demonstrated in part by his "aggressive stance" in this litigation, was "sufficiently final to concretely affect the [respondents'] interests," and that "absolutely

doned those contentions on appeal (see *id.* at 3a n.1), and they do not renew them in this Court.

On the merits, the court had "no difficulty" concluding that the Commissioner's application of Section 287.030(4) in refusing to consider respondents' license applications was "in direct conflict with federal law." Pet. App. 45a. The court then rejected petitioners' argument that the state provision was saved from preemption by Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b). Pet. App. 45a-47a. That Act provides that federal law will not preempt a state statute "enacted * * * for the purpose of regulating the business of insurance," unless the federal law in question "specifically relates to the business of insurance." 15 U.S.C. 1012(b) (*reprinted at* Pet. App. 53a). The district court held that Section 92 "grant[s] additional powers to national banks," but does not constitute "a regulation of the business of insurance." Pet. App. 46a. Similarly, the court observed that Section 287.030(4) "relates to the powers of bank holding companies, not to the powers of insurance companies or agents," and "does not regulate the business of insurance." Pet. App. 46a-47a.[2] Having concluded that the McCarran-

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no purpose would be served by permitting the Commissioner to continue with his charade of evaluation before [the] court addresse[d] the merits of this litigation." *Id.* at 30a.

[2] The district court also rejected (Pet. App. 36a-40a) petitioners' contention that the restriction imposed by Section 287.030(4) was authorized by Section 7 of the Bank Holding Company Act of 1956, 12 U.S.C. 1846. The court of appeals likewise found Section 1846 "irrelevant to this case" (Pet. App. 10a), and petitioners have not renewed that argument in this Court (see Pet. i).

Ferguson Act had no application to this case (*id.* at 47a), the court declared that national banks located and doing business in Kentucky towns with 5,000 or fewer inhabitants have a federal right "to engage in the business of insurance, in accordance with applicable law," and enjoined the Commissioner from refusing to provide any such bank with an application for a license to act as an insurance agent in such a town (*id.* at 48a-49a).[3]

3. The court of appeals affirmed. Pet. App. 1a-10a. The court first rejected (*id.* at 3a-7a) petitioners' suggestion that there is no conflict between Section 287.030(4) and Section 92. Applying an "actual conflict" standard, the court pointed out that, "while § 92 provides that national banks such as [respondents] 'may' act as insurance agents, section 287 provides that they 'may not.'" Pet. App. 4a-5a. The court found unpersuasive petitioners' contention that Section 92 should be read as purely "permissive," and thus subject to whatever restrictions a State might choose to impose. The court observed that the statute is absolute in its terms (providing that banks "may * * * act as the agent for" insurance companies), that it "helps to define the powers of national banks," and that allowing enforcement of Section 287.030(4) would "interfere[] with the realization of a chief ob-

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[3] The court "decline[d] to determine whether the Commissioner is required to issue licenses once the completed applications are received," noting that the application of other state law criteria for the issuance of insurance licenses presented different issues and "[might] well implicate McCarran-Ferguson in other respects." The court therefore held only that Section 92 prohibits the Commissioner from "refus[ing] to provide the requested applications." Pet. App. 47a n.8.

ject of § 92" by removing an additional source of revenue that Congress meant to provide for national banks that serve small towns. Pet. App. 6a-7a. The court therefore affirmed the district court's ruling that Section 92 preempts petitioners' application of Section 287.030(4) to respondents under "conventional preemption analysis."

The court of appeals also rejected petitioners' reliance on the McCarran-Ferguson Act. Pet. App. 7a-10a. The court noted that Section 287.030(4) "helps to define the powers of Kentucky bank holding companies by excluding such companies from participation in the activities that constitute the 'business of insurance.'" The court observed, however, that "[e]xcluding a person from participation in an activity * * * is different from regulating the manner in which that activity is conducted" (Pet. App. 9a), and it concluded that Section 287.030(4) "was enacted for the purpose of regulating certain conduct by bank holding companies" (Pet. App. 10a), and not with "the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance" (*id.* at 9a, quoting *United States Dep't of Treasury* v. *Fabe*, 113 S. Ct. 2202, 2210 (1993)). Because the court held that Section 287.030(4) was not "enacted * * * for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, it did not reach the question whether Section 92 "specifically relates to the business of insurance" for purposes of that Act. See Pet. App. 10a.

Judge Batchelder dissented. Pet. App. 11a-25a. Although she agreed with the majority that the Commissioner's application of Section 287.030(4) to respondents conflicted with Section 92, Judge

Batchelder disagreed with the court's McCarran-Ferguson analysis. See Pet. App. 11a. She concluded, instead, that in enacting Section 287.030(4) Kentucky "aim[ed] to protect or regulate the insurer/insured relationship" (Pet. App. 20a), and that the state law was therefore "enacted to regulate the business of insurance" for purposes of McCarran-Ferguson (*id.* at 21a). With respect to the second prong of McCarran-Ferguson, however, Judge Batchelder concluded that a court should apply a narrower standard to determine whether a conflicting federal law "specifically relates" to the business of insurance. *Id.* at 24a. Because "[t]he context of § 92 has always been within the regulation of banking rather than insurance" (*id.* at 23a), she would have held that the federal law did not contain a sufficiently "clear statement" that it was intended to regulate the insurance business or to preempt state law, and that the McCarran-Ferguson Act therefore saved Section 287.030(4) from preemption by Section 92. See Pet. App. 22a, 24a-25a.

ARGUMENT

The decision below in this case, although correct, conflicts with decisions of another federal court of appeals and of a state appellate court on a question of substantial importance to federal and state regulators, national banks, and issuers, sellers, and consumers of insurance products throughout the United States. The questions presented therefore warrant resolution by this Court. As petitioners point out (Pet. 17-19), however, this case is not the best vehicle for the consideration of those questions. We therefore agree with petitioners that this case should be held pending the Court's consideration of the peti-

tion in No. 94-1837, *Barnett Bank of Marion County, N.A.* v. *Gallagher*.

1. As both courts below (and the dissenting judge in the court of appeals) recognized (see Pet. App. 7a, 11a, 45a), Kentucky's general prohibition on banks' acting as insurance agents conflicts, as applied to the respondent banks in this case, with the insurance agency authority explicitly conferred on national banks by 12 U.S.C. 92 (Supp. V 1993). The proper resolution of this case therefore depends on whether normal principles of preemption are superseded in this instance by Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b). In applying McCarran-Ferguson, the courts below held (Pet. App. 10a, 46a-47a) that Ky. Rev. Stat. Ann. § 287.030(4) (Michie 1988) was not "enacted * * * for the purpose of regulating the business of insurance" within the meaning of Section 1012(b).

That decision is correct. As the court of appeals held (Pet. App. 9a), Section 287.030(4) "in no way governs the manner in which the activities constituting the 'business of insurance' are conducted" in Kentucky. It imposes no standards, and requires or forbids no practices, related to the substance of that business. It regulates neither the "transferring or spreading [of] a policyholder's risk," nor any other practice that is "an integral part of the policy relationship between the insurer and the insured." *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 129 (1982); see Pet. App. 7a-9a. Instead, as the court observed, it merely "helps to define the powers of Kentucky bank holding companies." *Id.* at 9a. Moreover, on its face, Section 287.030(4) applies only to "persons" (including bank holding companies) that

own more than half the capital stock of a bank. As noted above (see pages 3-4 & n.1, *supra*), the Kentucky Insurance Commissioner has interpreted the statute also to reach banks themselves if they are so owned. So far as we are aware, however, the Commissioner has never suggested that it would apply to a bank with no majority owner. It is difficult to understand why a rule intended to protect potential insurance buyers from some risk ostensibly involved in dealing with banks would depend for its application on the ownership structure of the particular bank involved. In fact, Kentucky's law attempts to regulate the structure and business of banks, not the business of insurance.[4]

Having held that Section 287.030(4) was not "enacted * * * for the purpose of regulating the business of insurance," the court of appeals did not address the second question under the McCarran-

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[4] The dissent below argues (Pet. App. 20a) that "the Kentucky legislature was concerned that if banks * * * were able to sell general insurance to their customers, the banks could unduly influence those Kentucky citizens and jeopardize the ability to pay claims when demands were made." With respect to solvency, it is not clear how the sale of unnecessary or unduly expensive insurance could jeopardize an insurer's ability to pay claims. If, on the other hand, the legislature's concern was that consumers "could feel coerced into purchasing insurance from the bank to obtain [a] loan regardless of the insurance premium" (*ibid.*, quoting *id.* at 59a), then Section 287.030(4) seems better characterized as a regulation of the relationship between banks and their loan customers—that is, of the business of banking—than of the business of insurance. Indeed, we note that federal banking law already prohibits national banks from tying the extension of credit to the purchase of any other product. 12 U.S.C. 1972 (1988 & Supp. V 1993).

Ferguson Act: whether 12 U.S.C. 92 "specifically relates to the business of insurance." 15 U.S.C. 1012(b). If, however, one were to conclude, as petitioners contend (Pet. 16-17), that Kentucky's effort to preclude banks with majority owners from acting as insurance agents was enacted to regulate "the business of insurance" for McCarran-Ferguson purposes, then surely one would conclude as well that Congress's express permission for national banks to engage in the same activities must "specifically relate[]" to the same business for purposes of the same federal statute. It is wholly implausible to contend, as petitioners do (Pet. 14-17), that a state law was enacted "for the purpose of regulating" a business but that a conflicting federal law does not even "relate" to that business.

2. The court of appeals therefore correctly held that nothing in the McCarran-Ferguson Act prevents 12 U.S.C. 92 from preempting the application of Section 287.030(4) to the national bank respondents under the circumstances of this case.[5] We agree with

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[5] See also *First Nat'l Bank of E. Ark* v. *Taylor*, 907 F.2d 775, 779-780 (8th Cir.) (state restrictions on sales of certain insurance by national banks not saved by McCarran-Ferguson), cert. denied, 498 U.S. 972 (1990); *United Services Auto. Ass'n* v. *Muir*, 792 F.2d 356, 364 (3d Cir. 1986) (state law prohibiting merger of bank and insurance company not saved because "affiliation between insurers and banks has no integral connection to the relationship between the insured and insurer" and anti-affiliation laws "have no part in the business of insurance under McCarran-Ferguson"), cert. denied, 479 U.S. 1031 (1987); *Independent Bankers Ass'n of America* v. *Heimann*, 613 F.2d 1164, 1170-1171 (D.C. Cir. 1979) (Comptroller's regulation of disposition of income from sale of credit life insurance by

petitioners (Pet. 14-17), however, that the court's decision conflicts with the decisions of the Eleventh Circuit in *Barnett Bank of Marion County, N.A.* v. *Gallagher*, 43 F.3d 631 (1995), petition for cert. pending, No. 94-1837 (filed May 8, 1995), and of the Louisiana Court of Appeals in *First Advantage Ins., Inc.* v. *Green*, 652 So. 2d 562 (Ct. App.), review denied, 654 So. 2d 331 (La. 1995), petition for cert. pending, No. 94-2130 (filed June 27, 1995). As we explained in our brief supporting the petition for a writ of certiorari in *Barnett Bank* (at 15-17), the holdings in these cases cannot be reconciled, and they leave national banks, federal and state regulators, and consumers subject to conflicting legal regimes on a matter of considerable commercial importance. There is no reason to believe that the conflict will resolve itself or become less important over time.

The non-preemption holdings in *Barnett Bank* and *First Advantage* permit significant, unwarranted state interference with activities that Congress has specifically authorized national banks to undertake. They also interfere with the Comptroller of the Currency's discharge of his "primary responsibility" for the supervision and regulation of those activities. See *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813 (1995); see also 12 U.S.C. 92 (Supp. V 1993) (subjecting banks' insurance agency activities to "such rules and regulations as may be prescribed by the Comptroller"). The Comptroller believes that agency sales of insurance can be a safe and important line of business that

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national banks preempted contrary state law, despite McCarran-Ferguson), cert. denied, 449 U.S. 823 (1980).

can contribute materially to a national bank's overall safety and soundness. Moreover, in the Comptroller's view, state restrictions that prevent national banks from exercising insurance agency powers authorized by Section 92 can put those banks at a serious disadvantage in the increasingly competitive market for all financial services. The Comptroller and the United States are also concerned that state restrictions of the type at issue here may operate to restrict competition, to the detriment of consumers, without significant countervailing consumer protection benefits. The questions presented in this case are therefore of considerable importance, and warrant resolution by this Court.

3. We also agree with petitioners (Pet. 17-19) that *Barnett Bank* provides a better vehicle than this case for this Court's consideration of the preemption issue. As we described in our brief supporting the petition in *Barnett Bank*, the court of appeals in that case found it necessary to reach both of the questions that may be pertinent under the McCarran-Ferguson Act: Whether the state law at issue was "enacted * * * for the purpose of regulating the business of insurance," and whether Section 92 "specifically relates" to that business. In this case the court of appeals reached only the first of those two questions. Pet. App. 10a. Although this Court might also find it necessary to reach only the first question, it would appear to be preferable to grant review in a case in which the court of appeals considered and decided both questions.

In addition, as described above (see pages 3-4, *supra*), the proceedings below in this case were complicated by a dispute over the proper interpretation of

the state law in question. The court of appeals decided the case on the assumption that the state law, which by its terms applies to banks' majority stockholders, also applies directly to the national bank respondents. See Pet. App. 5a. Although we have no reason to question that assumption, it appears that the question has not been settled as a matter of state law. *Ibid.*; see Pet. 18-19. It would appear to be preferable for this Court to grant review in a case in which the applicability of the challenged state statute to the party before the Court is unmistakably clear.[6]

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[6] We note that the petition in *First Advantage*, No. 94-2130, suggests (at 24-25) that that case would be the best vehicle for resolution of the preemption issue. The *First Advantage* court reached both questions under the McCarran-Ferguson Act, see 94-2130 Pet. App. 21a-27a, and we are not aware of any question concerning the application of Louisiana's anti-affiliation law to the petitioners in that case. Much of the state appellate court's analysis appears to derive, however, from the majority and dissenting opinions of the federal courts in this case and in *Barnett Bank*. See 94-2130 Pet. App. 27a-33a; compare, *e.g.*, *id.* at 19a-21a with Pet. App. 14a-15a. Although the *First Advantage* petition suggests (at 22-23, 25) that that case presents a separate issue concerning whether Section 92 is merely "permissive" (and thus presents no true conflict with a restrictive state law), the Louisiana court clearly held that Section 92 would preempt the State's anti-affiliation law but for the operation of the McCarran-Ferguson Act. 94-2130 Pet. App. 17a; compare, *e.g.*, Pet. App. 5a-6a (describing petitioners' similar "permissive" construction argument in this case), Pet. 14 n.10 (reserving same argument).

CONCLUSION

The petition for a writ of certiorari should be held pending consideration of the petition in No. 94-1837, *Barnett Bank of Marion County, N.A.* v. *Gallagher*, and disposed of as appropriate in light of the Court's disposition of that petition or its decision on the merits of that case.

Respectfully submitted.

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